

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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ARTHUR ALAN WOLK, :
 :
Plaintiff :
 :
v. : CIVIL ACTION NO. 02-2909
 :
UNITED STATES AIR FORCE, :
 :
Defendant :
-----x

MEMORANDUM IN SUPPORT OF
MOTION OF UNITED STATES AIR FORCE TO
TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff Arthur Alan Wolk purports to bring this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. It is not disputed the FOIA requires Government agencies to disclose certain documents upon proper request, 5 U.S.C. §552(a)(3)(A), and that "the district court[s] of the United States [have] jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld . . . , 5 U.S.C. §552(a)(4)(B).

It is equally axiomatic, however, that exhaustion of administrative remedies under FOIA is a prerequisite to judicial review in a FOIA action, and absent such exhaustion, the case is subject to dismissal for lack of subject matter jurisdiction.

See, e.g., McDonnell v. United States, 4 F.3d 1227, 1236 (3rd Cir. 1993) (FOIA lawsuit subject to dismissal for failure timely

to exhaust administrative remedies), citing Dettman v. Department of Justice, 802 F.2d 1472, 1475-77 (D.C. Cir. 1986) (same); Hamilton Sec. Group v. Dept. of Hous. & Urban Dev., 106 F.Supp. 2d 23, 27 (D.D.C. 2000) (same).¹

This is an a fortiori case, for plaintiff Wolk never made a FOIA request, asking for the information he seeks to acquire through this suit, notwithstanding his contention to the contrary, see Compl. ¶'s 5, 15. For one thing, as reflected in the attached declarations of Angelica Cordero (FOIA manager/Randolph AFB TX), Roberto Trinidad (FOIA Manager/Air Reserve Personnel Center/Denver), and Rhonda Jenkins (Chief/Documentation & Services Branch/11th Communications Squadron/Arlington VA), the Air Force has no record of having received a FOIA request from Mr. Wolk in the time frame at issue in this case. Moreover, the FOIA request which plaintiff alleges in Paragraphs 5 and 15 of the Complaint is not a FOIA request at all, but rather a subpoena, dated May 31, 2001 and directed to a Master Sergeant Technician Lewis at the Randolph Air Force Base in Texas, see Compl. Ex. A.

¹ Some courts hold that timely exhaustion is not a jurisdictional prerequisite as such and dismiss instead under FRCP 12(b)(6) for failure to state a claim upon which relief could be granted, e.g., Taylor v. Appleton, 30 F.3d 1365, 1367 n.3 (11th Cir. 1994).

Finally, it is noteworthy that the subpoena of which a copy is attached to the Complaint does not ask for "documents", but rather a "list"; plaintiff himself emphasizes this point, see Compl. ¶20. However, FOIA requires Government agencies to produce "documents", under the circumstances and subject to the exceptions set out in the statute, see 5 U.S.C. §552(a)(3)(A); it does not require them to compile "lists". The same is true of the subpoena provisions of Federal Rule of Civil Procedure 45; nothing therein requires the compilation of a "list" either.

In short, the essential prerequisite to this Court's subject matter jurisdiction under FOIA is, as the United States Court of Appeals for the Third Circuit noted in McDonnell, "a formal request for documents within the meaning of the statute", 4 F.3d at 1236-37. No such request has been made by this plaintiff, as a condition precedent to this lawsuit, and therefore, it should be dismissed.

CONCLUSION

For the foregoing reasons, the United States Air Force respectfully requests that this motion be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify this 14th day of June, 2002, that a copy of the foregoing Motion of United States Air Force to Dismiss for Lack of Subject Matter Jurisdiction was served by United States Mail, postage prepaid, first-class on:

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